



POLICE DEPARTMENT

May 17, 2010

MEMORANDUM FOR: Police Commissioner

Re: Detective Jeffrey McAvoy
Tax Registry No. 909823
Housing Borough Bronx/Queens
Disciplinary Case No. 85410/09

The above-named member of the Department appeared before me on January 7, 2010, charged with the following:

1. Detective Jeffrey McAvoy, assigned to Housing Borough Bronx/Queens, on or about April 8, 2009, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Detective McAvoy, during a verbal argument with his girlfriend, [REDACTED], told her, in sum and substance "I'll put a bullet in your fucking head in front of your kids."

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

2. Said Detective Jeffrey McAvoy, as assigned as indicated in Specification #1, on or about April 8, 2009, failed to safeguard three (3) firearms in that he kept them unsecured on top of a kitchen cabinet.

P.G. 204-08, Page 2, Paragraph 7 – FIREARMS-GENERAL REGULATIONS

3. Said Detective Jeffrey McAvoy, assigned as indicated in Specification #1, on or about, April 8, 2009, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Detective, during a verbal argument with his girlfriend, [REDACTED], disconnected the telephone in his house to prevent [REDACTED] from calling 911. (As amended)

PG 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Scott Rosenberg, Esq., Department Advocate's Office, and the Respondent was represented by James M. Moschella, Esq.

¹ The correct spelling of her surname is [REDACTED]

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of Specification Nos. 1 and 2. The Respondent is found Not Guilty of Specification No. 3.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called [REDACTED], Trooper James Hujus, Sergeant David Scott, Lieutenant Michael Mohin and Sergeant Alfred Vargas as witnesses.

[REDACTED]

[REDACTED] testified that she works at an orthodontist's office as an insurance coordinator. Subsequent to receiving a subpoena from the Department, [REDACTED] called and spoke with the Assistant Department Advocate (Advocate). During the conversation with the Advocate, [REDACTED] stated that she would testify on behalf of the Respondent and informed the Advocate that her [REDACTED]-year-old daughter, [REDACTED], would not comply with the subpoena. [REDACTED] came home from school, read the subpoena that was left on the counter and is currently in therapy because she has been traumatized by the subpoena. [REDACTED] did not know how the subpoena got on the counter because she was not "there to tell you who put it on the counter."

[REDACTED] further testified that she has been living with the Respondent along with her two daughters, [REDACTED]. On April 8, 2009, [REDACTED] and the Respondent had an argument because the Respondent told [REDACTED] to move out of the house, and [REDACTED] told the Respondent that she was moving out with [REDACTED]. That evening, while she, her two daughters, the Respondent, [REDACTED], were having dinner, [REDACTED] left the table and she heard the Respondent tell [REDACTED] to pack her belongings and call her father. [REDACTED] learned later on that [REDACTED] had given her middle finger to [REDACTED] and the Respondent had asked her to stop. Then [REDACTED] gave "the double" middle finger to the Respondent, which was when he got up and said, "Pack your shit and call your father." [REDACTED] started screaming at the Respondent, "If she leaves, I'm leaving."

Subsequently, [REDACTED] ran out of the house and called her father and [REDACTED] began to pack her belongings. The Respondent asked her if she needed his help in packing and [REDACTED] responded, "Don't bother." The Respondent then went and took the girls' beds out of the bedroom and put them in the hallway. Upon seeing that the Respondent had taken the beds out, [REDACTED] went outside to make a phone call. When the Respondent asked her what she was doing, she told him that she was calling a friend because she needed a truck to pack all of her belongings.

[REDACTED] stated that she went outside and called a friend who has a truck and asked for his help. The friend also advised her to call the police. Because [REDACTED] was mad at the Respondent, she testified that she made a false statement to 911 saying that the Respondent threatened to put a bullet in her head in front of her kids. [REDACTED] heard the Respondent saying something to her while she was talking on the phone, but did not recall what he had said.

When the State Troopers arrived at the Respondent's house to investigate the 911 call, [REDACTED] k, afraid of getting in trouble for having them come to her house, told the troopers the same story she had reported to 911. [REDACTED] knew that she falsely stated it. She nonetheless wrote the same story on the Domestic Incident Report (DIR) and signed it. [Department's Exhibit (DX) 1 is page 1 of the report; DX 2 is a duplicate copy of page 1 and page 2 of the report, which contains [REDACTED] Statement of Allegations/ Supporting Deposition].

After listening to a recording of [REDACTED]'s call to 911 [DX 4, accompanied by an affidavit from the [REDACTED] Emergency Services Center (DX 4a) and transcript (DX4b)], [REDACTED] said that her daughters were standing next to her during the call and overheard her claiming that the Respondent had said that he was going to put a bullet in her head. In fact, she said, he was saying, "It's not like I'm beating you. It's not like I'm putting a bullet in your fucking head." She added "All he was doing was asking us to leave, or asking my daughter to leave. That's all he was asking to be done; and then me going overboard and calling 911." She noted that the Respondent only meant for her to leave the house, but she became furious from the moment he asked to help her to move out. [REDACTED] admitted that she made a false statement both to 911 and to the troopers.

During the evening of April 8, 2009, [REDACTED] spoke with someone from the Department but did not remember his name (DX 6 is a recording, and DX 6a is a transcript, of this interview). The person on the phone asked her what had happened at the house. [REDACTED], not wanting to lie about the incident again, told the person to "go and do his investigation himself." She indicated that she was "very pissed" and felt threatened because now she had nowhere to live with her children. [REDACTED] was also

concerned that the Respondent would get in trouble with his job because she believed that what she said was inaccurate.

[REDACTED] testified that the Respondent had his firearms in the residence on that day because he had just been transferred and was on vacation. She learned that his firearms were on top of the cabinet when the troopers asked the Respondent where they were.

[REDACTED] did not know whether the firearms were locked or unlocked.

[REDACTED] testified that she had an interview with two members of the Department, Lieutenant Mohin and Sergeant Wilhelmy, on May 4, 2009 (DX 5 is a recording and DX 5a is a transcript of the interview). During the interview, [REDACTED] stated that the Respondent usually kept his firearms in the kitchen above the cabinet. Furthermore, [REDACTED] stated that the firearms are not locked in a safe.

On additional direct examination [REDACTED] agreed that she was "very upset" and "very emotional" and crying at one point at that time. [REDACTED] further stated that she lied during the 911 call that the Respondent had threatened to "put a bullet in her head" in order "to get him in trouble or get some kind of mediation." She said the first time she told the truth about the events was six to eight weeks later, to Mohin and Wilhelmy. She has never made any allegation that he pointed his gun at her or that he has hit her or hit her children. She was afraid that she would get in trouble, but now she is coming forth because "it has to be clarified."

On cross-examination, [REDACTED] testified that she feels guilty that she made a false statement against the Respondent and that she now wants things to be cleared up. [REDACTED] first revealed that she had misinterpreted what the Respondent had said to her when Lieutenant Mohin and Sergeant Wilhelmy came to the house where she lives with the

Respondent. [REDACTED] had left the house, but went back to live there within a couple of days after the incident. She stated that she had only taken a few outfits for her and her children upon leaving but had never moved any physical belongings.

[REDACTED] testified that the Respondent was not in possession of his firearms between April 8, 2009 and May 4, 2009, when Mohin and Wilhelmy came to visit her. To her knowledge, the Respondent kept his firearms at work.

[REDACTED] noted that she has known the Respondent for five years. She described the Respondent as very witty and a great cook. She indicated that the Respondent was "too involved" in [REDACTED]'s math homework, so she got angry at that. [REDACTED] further testified that she had never been threatened by the Respondent in any manner before the incident of April, 2009.

[REDACTED] testified that she had consumed a "couple of drinks" at a birthday celebration after work and had an additional beer at home on the day of the incident. She noted that that is also a part of the reason why she made a phone call to 911 without thinking rationally. Prior to calling 911 she placed a phone call to her friend to come to the house to help her move her belongings but the friend was not very receptive and suggested she call 911 instead. At the time, she was standing in the driveway and the Respondent was talking to her from the porch, about 30 feet away.

On May 4, 2009, when Mohin and Wilhelmy visited the Respondent's house, [REDACTED] and [REDACTED] were at home. [REDACTED] was interviewed alone and [REDACTED] was interviewed with her mother present. [REDACTED] restated what [REDACTED] told Mohin and Wilhelmy, that the Respondent would put a bullet in [REDACTED]'s head. [REDACTED] testified that [REDACTED] was standing right next to her when she made the phone call to 911. [REDACTED]

heard everything [REDACTED] was saying to 911. After Mohin and Wilhelmy left, [REDACTED] asked [REDACTED] why she did not tell the truth. [REDACTED] responded that she did not want [REDACTED] or herself to get in trouble. [REDACTED] stated that [REDACTED] was not present to testify in the trial room because her therapist and her father suggested it would be in [REDACTED] best interest not to testify.

[REDACTED] denied that she ever attempted to call 911 from inside the house on April 8, 2009, or that she was prevented from placing a call from inside the house by the Respondent that day. She said the phone had been disconnected for "months." "The computer has been hooked up to it."

On redirect examination, [REDACTED] said that when [REDACTED] told Mohin and Wilhelmy that she heard the Respondent say that he was going to put a bullet in [REDACTED]'s head, [REDACTED] did not correct her because she did not "want to put her on the spot," and she was "not going to call her a liar in front of them." She noted that [REDACTED] had anger issues that led her to cut her own arms in her class. [REDACTED] particularly did not like the Respondent checking her homework. Her attitude toward the Respondent was that, "he is not my father." [REDACTED] has been divorced from [REDACTED] father for six or seven years and [REDACTED] sees her father every weekend.

During further cross-examination, [REDACTED] testified that after Mohin and Wilhelmy left, she confronted [REDACTED] and asked why she did not tell the truth during the interview. [REDACTED] then responded that she did not want her mother or herself to get into trouble "for misstating and twisting the words around on the night of the incident."

On questioning by the Court, [REDACTED] clarified a portion of her 911 call where she stated "Yes. I have bad service here...I tried calling from the home phone and he had .

disconnected it." She testified that she never attempted to call 911 from the home phone because the Respondent had disconnected the phone months prior to the day of the incident, and not on April 8, 2009.

Trooper James Hujus

Hujus is a New York State Trooper assigned to Troop [REDACTED]. He had been with the New York State Police as a Trooper since 2003. On April 8, 2009 at approximately 6:45 p.m., Hujus received a radio run regarding a domestic dispute at [REDACTED] [REDACTED]. About five minutes later, Hujus arrived at [REDACTED] and observed the Respondent sitting on the front steps of his residence. Hujus stated that the Respondent identified himself as an off-duty police officer and showed him his identification. The Respondent told Hujus that he had a verbal disagreement with his girlfriend, [REDACTED]

Hujus then went inside the residence to talk to [REDACTED] k. She seemed very upset. Hujus observed that there were two mattresses on the floor; one was in the living room and the other was in the hallway. Hujus further testified that [REDACTED] told him that while sitting at the dinner table, her daughter, [REDACTED] "hung the Respondent the finger," and the Respondent told her she was no longer welcome at the residence and she needed to call her father to get her. [REDACTED] k further stated to Hujus that she told the Respondent if her children were not welcome in the residence, she was leaving as well. After that, she went outside and the verbal argument escalated outside. Hujus testified that [REDACTED] said that the Respondent stated that he was going to shoot her in the head in front of her children.

Hujus then interviewed [REDACTED] in the living room with her mother approximately ten feet away. [REDACTED] appeared upset. She stated basically the same thing as her mother, that the Respondent said he was going to shoot her mother in the head. After

interviewing [REDACTED] Hujus went back to Pollack, while another trooper talked to the Respondent. Hujus requested Pollack fill out the deposition section of the DIR and she agreed to complete the report (DX 2). Hujus asked Pollack to write a brief summary of why she called the police. When she completed the statement, Hujus read back to her what she wrote. Moreover, he asked her if there was anything to add and read the bottom line that "False statements made herein are punishable as a Class A misdemeanor..."

[REDACTED] responded that there was nothing to add, that she understood the terms, and that everything was the truth. Hujus then had [REDACTED] sign the bottom of the DIR.

Hujus testified that he filled out the rest of the DIR and wrote on the report, "Suspect made statement to victim that he was going to put a bullet in the head after an escalated verbal argument. Victim does not wish to have him arrested," and his Sergeant, Dennis Trombley, wrote in the next line, "No weapons displayed."

After completing the paperwork at the kitchen table, Hujus went to his vehicle and Sergeant Scott approached him and said that he had three firearms that needed to be secured. Hujus testified that to his knowledge, two of the firearms were loaded and Sergeant Scott unloaded them before presenting them to him. He stated that in regard to the first weapon, he believes that a bullet was in the chamber. When Hujus went back to his station, he completed a New York State Incident Report (DX 3) and secured the firearms as evidence.

Hujus said [REDACTED] appeared upset because her face was flushed and red and her eyes were swollen from crying. While [REDACTED] did not appear impaired, he could smell alcohol. [REDACTED] had told him that she and the Respondent had a drink with dinner.

On cross-examination, Hujus testified that he was not present at any point during

the altercation between [REDACTED] and the Respondent, and that his testimony consists of what he was told by the parties upon his arrival on the scene. He agreed that the incident had subsided or was over at the time of his arrival. Hujus said that [REDACTED] made it clear to him that at no point in time did she ever see a firearm during the incident, or that the Respondent ever had a firearm out during the incident.

Hujus acknowledged that on the DIR he had indicated that there was no prior domestic violence history because although the Respondent had domestic violence in the past, it did not involve [REDACTED]. He agreed that he indicated on the DIR that there were no prior domestic violence police reports and that the victim was not fearful of the Respondent. He described the Respondent as being cooperative with his investigation, and when he was asked about his firearms, the Respondent led the troopers to the firearms. The Respondent was not arrested.

On questioning by the Court, Hujus testified that [REDACTED] was in the living room when she heard the Respondent make the statement about putting a bullet in her mother's head. He described the Respondent's demeanor when he first saw him outside of his house as "cooperative." Hujus said he did not seem upset nor was his face flushed, "He just seemed rather embarrassed."

Sergeant David Scott

Scott testified that he is a Zone Sergeant in the New York State Police. He is in charge of patrol supervision in [REDACTED]y. On April 8, 2009 at about 6:45 p.m., Scott heard a radio transmission about a domestic incident in the town of [REDACTED] involving a police officer with a firearm. He drove to the residence and arrived

there sometime between 7:10 p.m. and 7:15 p.m.

On the scene, Scott observed that there were two troopers there; one trooper was outside with the Respondent. Scott approached them to find out what had happened. After he spoke with them, Scott went inside to the residence, and observed that Hujus was taking a deposition from [REDACTED] and that there were children in the living room. Scott briefly spoke with the children to ensure they were fine. Specifically, he had a longer conversation with the eldest one, [REDACTED]. [REDACTED] told him that there had been an argument at the dinner table and at one point, the Respondent got upset and told them to leave the house. The Respondent told her to call her father to come and take all of them. While the entire family was outside, the Respondent apparently made a statement to her mother that he was going to put a bullet in her head.

Subsequently, Scott went outside to ask the Respondent if he had firearms in the house. The Respondent advised him that there were three firearms on top of the cabinet in the kitchen. Scott went to the kitchen, climbed from a chair onto the countertop, and retrieved them. The firearms, a semi-automatic Glock and two revolvers, were neither secured nor locked. The Glock was loaded with a magazine and a round in the chamber, and one of the two revolvers was loaded as well. Scott unloaded the weapons, filled out a property receipt, and turned them over to Hujus.

On cross-examination, Scott testified that the Respondent was cooperative with him during his investigation and that at no point in time did the Respondent attempt to conceal the fact that there were three firearms in the residence. Walking into the kitchen, Scott was not able to see the firearms atop the cabinet. Scott further testified that if nobody had told him the location of the firearms, he would not have known where the

firearms were.

Scott stated that the kitchen cabinet depicted in a photograph [Respondent's Exhibit (RX) A] appeared to be the cabinet from which he retrieved the Respondent's firearms, however, he could not be sure it was the exact kitchen.

Scott testified that he did not know whether or not the Respondent made the statement about putting a bullet in [REDACTED]'s head while the entire family was outside but [REDACTED] told him that she was outside at that moment. The Respondent was not arrested and no orders of protection were issued or requested by anybody.

On redirect examination, Scott testified that he did not take the photograph of the cabinet (RX A) and it is possible that could be someone else's kitchen cabinet. Scott noted that [REDACTED] informed him the firearms were in the kitchen before he retrieved them.

Lieutenant Michael Mohin

Mohin, a 25-year veteran of the Department, has been assigned to the Organized Crime Control Bureau Investigations Unit for approximately three years. Mohin stated that his duties include investigating acts of misconduct and supervising four sergeants who also conduct investigations. During the course of his career, Mohin has conducted hundreds of investigations of members of the service and currently oversees approximately 60 cases each year.

Mohin testified that on April 21, 2009, he was assigned a domestic incident case involving the Respondent and Pollack that occurred on April 8, 2009. Mohin stated that he was responsible for any cases that came into Queens or the Bronx, and that it was

referred to him by the Internal Affairs Bureau (IAB). The case was assigned to Wilhelmy and Mohin was his direct supervisor. In June 2009, Mohin, Wilhelmy and a sergeant from IAB interviewed the Respondent. Mohin believed that the Respondent was represented by counsel and a union delegate. The Respondent indicated that he understood the Patrol Guide provisions regarding official Department interviews and agreed to waive the formal reading of those rights in the presence of his attorney.

During the interview, the Respondent indicated that he had unsecured firearms on top of a cabinet in his kitchen. Mohin believed that the Respondent was asked whether or not the firearms were loaded, and that the Respondent stated that he was not sure. Mohin stated that the Respondent indicated that he had been with [REDACTED] for four years, that they have lived in the same residence for two years and that on April 8, 2009, they were both residing at the Respondent's home. Less than a week after that date, [REDACTED] had moved back into the Respondent's residence.

Mohin stated that he and Wilhelmy conducted an interview with Pollack at the Respondent's residence "some time in April, after we got the complaint." Mohin stated that they knocked on the door and identified themselves to [REDACTED] and she allowed them into the house. [REDACTED] indicated to them that the Respondent occasionally kept guns in the house and that they did not have a safe. During the interview, Mohin asked [REDACTED] for permission to speak to her daughter, [REDACTED], who [REDACTED] years old at that time. [REDACTED] gave them permission to speak with her daughter and was present for her interview.

Mohin stated that [REDACTED] was asked whether any threatening statements were made in the residence on the night in question. Mohin testified that [REDACTED] had told him

that she heard the Respondent, "threaten to put a bullet in her mother's head." Mohin stated that the reason that he remembered this interview with [REDACTED]'s daughter was because she was able to describe where she was standing inside of the house when the Respondent made this statement. [REDACTED] told Mohin that she was standing behind the Respondent when he said this, and that he was standing by the doorway. Mohin stated that [REDACTED] was "a little nervous," but that they assured her that she was not in trouble. She maintained that she was certain about what she heard.

On cross-examination, Mohin testified that the entire interview was recorded using a digital recording device and that the transcript that was prepared is a fair and accurate representation (DX 5 and DX 5a). Mohin stated that he had no prior involvement in the case when he received it on April 21, 2009. He assigned it to Wilhelmy and participated in the investigation.

Mohin testified that he reviewed the initial call-out package that was prepared in this case. Initial call-outs are usually done for fact-finding purposes and they usually record statements since memories of the event are fresher when closer to the event. Mohin stated that Duty Captain Farrell conducted the preliminary investigation into this incident with the assistance of the Patrol Borough Bronx Investigations Unit. Mohin stated that he received the report and that it showed that an interview with the Respondent took place on the night of April 8, 2009.

Mohin stated that based on his recollection of the report, the Duty Captain found the Respondent fit for duty and thus there was no change in his duty status. The call-out also showed that [REDACTED] was interviewed on the night of the incident. However, she was interviewed again to discuss the events of that day, and Mohin stated that "(it) is common

in all my investigations in domestics, absolutely" to re-interview a witness. Mohin testified that upon his interview with [REDACTED], she believed that she might have misunderstood what was said, but affirmed that in the DIR, she wrote that the Respondent had threatened her in making the statement about putting a bullet in her head and that she had told this to the responding troopers.

However, at Mohin's interview of [REDACTED], she also stated that she "misinterpreted" what the Respondent said the night of the incident. [REDACTED] told Mohin that she never felt that the Respondent would actually harm her and that she was on the phone at the time that the threatening statement was allegedly made. Mohin and Wilhelmy visited the Respondent's house unannounced because [REDACTED] did not respond to their prior phone calls. At no point in time did [REDACTED] try to prevent Mohin from interviewing her daughter.

During Mohin's interview of the Respondent, he denied having ever made the alleged statement. Similarly, the Respondent denied having made the statement when he was interviewed by the Duty Captain on the night of the incident. During both interviews, the Respondent claimed that what he actually said had been misconstrued.

On re-direct examination, Mohin testified that after [REDACTED] talked with the Respondent, "she basically backtracked...she must have misunderstood what he said." Mohin stated that at his interview with [REDACTED], she told him about this misunderstanding. [REDACTED] was interviewed by Mohin on May 4, 2009, less than a month after the incident. Mohin testified that prior to May 4, 2009, he and Wilhelmy had made attempts to contact [REDACTED] on her cell phone, but she never responded, so they decided to travel to the Respondent's residence. [REDACTED] did not have an opportunity to confer with her daughter

prior to the interview. Mohin indicated that a visit without prior notification can be beneficial in terms of finding potential witnesses in the neighborhood. However, where the Respondent and [REDACTED] live is a [REDACTED].

During further-cross examination, Mohin testified that [REDACTED] fully cooperated with his investigation in a cordial manner, that she answered all of his questions, and that she allowed her daughter to speak with them.

Sergeant Alfred Vargas

Vargas has been with the Department for 12-and-a-half years. For the past four years he has worked in the Bronx Investigations Unit as an investigator. On April 8, 2009, Vargas was working when he received a call-out at approximately 8:00 p.m. His captain provided him some preliminary information in regard to the incident.

Vargas called [REDACTED] that evening and she gave him a brief description of the incident. [REDACTED] told him that she felt threatened, but she "refused to repeat a comment" that the Respondent had made to her. [REDACTED] stated that she had spoken with troopers who had responded and completed some paperwork and that it would be available for them to see. [REDACTED] told Vargas that the Respondent is a good man and that she did not think that he would hurt her. Vargas testified that, "She said that he's a good man and she wasn't looking to get him into trouble with his job and that she wasn't going to repeat exactly what she had said to State Troopers."

Vargas stated that he also had the opportunity to interview the Respondent at his office in the Bronx. The Respondent stated "that he didn't make the indication that he would shoot her in the head. He stated that he was questioning her why she was calling

911. That he wasn't beating her." The Respondent also stated that he was not shooting her and also something else that Vargas stated that he could not remember, but that was on the tape.

On cross-examination, Vargas stated that [REDACTED] told him that the Respondent had never threatened her in the past, nor was there ever any physical altercation between them. Vargas stated that he did further investigation to see whether there was any history of violence or complaints between them, and he found none. On the night of the incident, Duty Captain Farrell made the decision that the Respondent was fit for duty and that his duty status would not be changed. After the initial investigation was completed, the case was referred to another investigative unit for follow-up.

Upon questioning by the Court, Vargas stated that [REDACTED]'s demeanor, "appeared to be calm, but it sounded like she was upset the incident had occurred." [REDACTED] was not fully cooperative as she refused to repeat what she had told the troopers.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent, a Detective Second Grade, testified that he has been on Modified Assignment at the VIPER Unit since May of 2009, approximately seven or eight weeks after the incident. He has been a member of the Department for 25 years and was assigned to the rank of Detective in 1999. The Respondent testified that he has known [REDACTED] for approximately five years and that for the past three years they have lived together with her children, as well as his son on a part-time basis. Prior to April 8,

2009, the police never responded to his residence for an incident between himself and [REDACTED].

The Respondent said that on April 8, 2009, he, [REDACTED] and the children were having dinner and [REDACTED] stepped away to put plates in the kitchen. The Respondent observed [REDACTED] giving her sister the middle finger. The Respondent caught her doing it several times and calmly told her to stop, but she did it again. The Respondent finally told her, "Stop before you get yourself in trouble."

The Respondent stated that although [REDACTED] is not his biological daughter, he treats her as if she is his daughter, taking her to the movies, helping her with homework, and dropping her at her friend's house for sleepovers. However, he usually leaves disciplining [REDACTED] to [REDACTED]. The Respondent testified that [REDACTED] had been having disciplinary problems at school and at home for approximately ten months prior to the incident.

The Respondent said that when he got up from the dining table, he saw, in the reflection in the front window, that [REDACTED] was giving him the middle fingers with both hands, behind his back. He turned around and told [REDACTED] "Call your father. Pack your things and get out of my house... You're not welcome here anymore if you're going to continue to act this way."

According to the Respondent, when [REDACTED] heard him yelling at her daughter, she "flew in...like a bat out of hell." When she found out what had just happened, she became furious and said that if he was yelling at her daughter and telling her to leave, then she ([REDACTED]) was leaving as well. [REDACTED] started taking shower curtains down and "just going nuts." She told [REDACTED] to call her father, and she went outside to call her

father on her cell phone. The Respondent asked [REDACTED] if she needed help packing "and she got bent out of shape." He went to the bedroom and took [REDACTED]'s mattress out into the hallway. When [REDACTED] went outside, the Respondent went to the kitchen and started cleaning the kitchen. He said that at this point, about 10 to 15 minutes had elapsed from the time he told [REDACTED] to leave.

The Respondent explained that in taking the mattress out into the hallway, he was hoping to show [REDACTED] how ridiculous this argument was. He said that he went out on the porch and saw [REDACTED] and [REDACTED] at the end of the driveway. [REDACTED] was talking on the phone and he asked who she was talking to. [REDACTED] then mouthed, "I'm on the phone with the fucking police." The Respondent then replied, "I hope you are telling them the truth, that I'm not breaking nothing in the house. I'm not yelling at you. I'm not shooting you. I'm not breaking bones." To this [REDACTED] responded, "You want to do what? You want to shoot me in the fucking head, in front of my kids?" The Respondent said [REDACTED] was standing next to [REDACTED], a little farther than 34 feet away from the porch he was standing on. He said [REDACTED] was cursing at him, and that "she was pissed."

After the exchange, the Respondent went back into the house, cleaned off some dishes, and then went back outside. [REDACTED] was still on the phone and then the trooper pulled in the driveway. He said about 25 to 30 minutes had elapsed from the first argument until the trooper's arrival. About ten minutes had passed from the time he spoke to [REDACTED] from the porch and the time the trooper appeared.

The Respondent testified that he was not aware that [REDACTED] tried to make a phone call from inside the house because that phone has been disconnected since they moved into the house. The router for the computer was broken when they moved into the house,

and the whole family has cell phones. At no point in time on April 8, 2009 did the Respondent disconnect the home phone to prevent [REDACTED] from calling 911.

The Respondent said he cooperated with Hujus, who approached him while he was sitting on the porch. He said his firearms were in his kitchen, on top of a cabinet “approximately 10 feet in the air.” He identified RX A as a photograph that he took of the kitchen cabinet and said that his firearms were on the top of the cabinet, in a six to seven-inch drop behind the crown molding.

The Respondent said that he did not normally store the firearms at the residence, but he was on vacation and had just been transferred to the Bronx Gang Squad on April 1, 2009. He went down to his previous command earlier in the day on April 8, 2009 and brought the firearms home. He said the firearms had been in his home for about four hours before the incident occurred.

The Respondent stated that following the incident, [REDACTED] returned to the house about three or four days later. He said that there were no further arguments between [REDACTED] and him and they still reside together.

On cross-examination, the Respondent agreed that the firearms were not “chained or locked to a fixed object,” and that if someone had gotten to the top of the cabinet, they would have had access to the firearms. He said nothing in the Patrol Guide requires him to have a barrel lock or trigger lock on his firearms, nor does it require him to have the firearms in a locked, fixed container.

The Respondent agreed that [REDACTED] had been having behavioral problems and disciplinary problems, that he treated her as if she were his own daughter, and that he did make a statement kicking her out of his house. He said it was [REDACTED] mattress and

comforter that he moved out into the hallway. He said [REDACTED] was taking pots and pans from beneath the cabinet before going to the bathroom and removing the shower curtain.

The Respondent stated that prior to the incident, his relationship with [REDACTED] was "great." He denied they were having any relationship problems. Five to ten minutes had elapsed from the time that he first told [REDACTED] to call her father to the time [REDACTED] started packing up her belongings.

The Respondent said that when he initially went outside and saw her on the phone, he asked her who she was on the phone with and [REDACTED] said, "I'm on the phone with the fucking police." He said she said this "with attitude" and her tone of voice was "extremely sarcastic." He believed she was on the phone with the police. He agreed that [REDACTED] sounded upset and emotional, and not sarcastic, in the 911 recording.

FINDINGS AND ANALYSIS

There is no question that the Respondent and his live-in girlfriend, [REDACTED], had an argument on the day in question. The charges in this case stem from that argument and the resulting removal of the Respondent's firearms by responding police officers.

The Respondent is charged, under Specification No. 1, with telling [REDACTED], "I'll put a bullet in your fucking head in front of your kids," during a verbal argument.

[REDACTED] came into this Court and testified that this did not occur. She testified that she was very angry at the Respondent and called 911, and as a result, she lied. She said she repeated the lie when the officers responded to the scene at the Respondent's home in [REDACTED], because she was afraid she would get into trouble if she retracted

her story. She also testified that when the Respondent saw that she was on the phone he asked her why she was calling and that what he actually said was, "it's not like I said I would put a bullet in your head."

The Respondent also testified that he did not threaten to put a bullet to in her head but when he learned that she was on the phone with the police he merely said "I hope you are telling them the truth, that I'm not breaking nothing in the house. I'm not yelling at you. I'm not shooting you. I'm not breaking bones."

So according to [REDACTED] and the Respondent, the allegation was all either a big lie or a mere misunderstanding of what was said.

The Department placed in evidence the 911 call made by [REDACTED] to report the incident and obtain a police response (DX 4). While hearsay evidence is admissible in this tribunal, the audio recording in this case is in fact "testimonial" in nature and therefore evidence of the event in question, People v. Conyers, 33 AD2d 929 (2nd Dept., 2006).

The audio recording of the 911 call which was placed in evidence tells a different story than that presented by the Respondent and [REDACTED] in Court. On the audio recording, [REDACTED] indicates that the Respondent threatened to shoot her in the head in front of her children. She described a tumultuous situation in which the Respondent told her that the house was in his name and she has to get "the fuck" out. She said on the audio recording that the Respondent was throwing her stuff out. She said that her two girls, [REDACTED] years of age, were out in the street without their coats because the Respondent would not let them back into the house.

[REDACTED] can be heard sobbing. Her tone is not angry, but fearful. She told the 911

operator that she did not want to get the Respondent in trouble with his job; indeed in a highly emotional tone of voice she said she did not want to get him "jammed up."

The question then becomes which version is to be believed. [REDACTED] voice on the audio recording is extremely persuasive and what she says seems to have been spontaneous and has the ring of truth.

Additionally there are other facts which tend to support its veracity over the version of events put forth by the Respondent and [REDACTED] in their testimony at this trial.

In the Respondent's version of events he removed [REDACTED]'s mattress and took it out to calm [REDACTED] down and show her how ridiculous the argument was. This simply makes no sense. However the Respondent's taking the mattress out corroborates the version [REDACTED] put forward in the 911 call, which was that he was throwing them out of the house. Moreover, Hujus observed two mattresses on the floor, one in the living room and one in the hallway, again consistent with the Respondent throwing them out of the house. Hujus also observed that [REDACTED] was visibly upset and her eyes were swollen from crying.

As noted earlier, on the audio recording, [REDACTED] can be heard telling the 911 operator that her daughters are stuck out in the cold because the Respondent would not let them back into the house to get their coats. [REDACTED] can be heard comforting her daughters who are clearly upset. Then she can be heard on the audio recording, instructing her daughters to go into the house because the Respondent is outside. This would not have happened if the situation was as [REDACTED] and the Respondent testified at trial.

The Court notes and has taken into consideration the fact that [REDACTED] made a

statement which is against her “penal interest” in that she admitted to falsely reporting an incident. The Court also notes that it is not uncommon for the victims of domestic violence to recant their original claims, particularly in a case such as this, where the parties have reconciled and resumed living together.

Certainly even during the incident [REDACTED] indicated that she had no desire to get the Respondent in trouble with his job, noting that he put her in a position where she had to call 911.

The version of events presented on the recording of the 911 call is direct and substantial evidence of the events in question and it is very convincing. The Department has met its burden and the Respondent is found Guilty of Specification No. 1.

Specification No. 2 charges the Respondent with failing to safeguard three firearms he owned “in that he kept them unsecured on top of a kitchen cabinet.” It is undisputed that the Respondent kept three firearms on top of a kitchen cabinet.² While certainly out of view and high up near the ceiling, the weapons were clearly not properly secured. A curious child, (there were three in the household), a significant other (in this case, [REDACTED] or an intruder, might come across these weapons and there would have been no barrier to them taking or using them, intentionally or by accident. The Respondent is found Guilty of Specification No. 2.

Specification No. 3 alleges that the Respondent “disconnected the telephone in his house to prevent [REDACTED] from calling 911.” The only proof to support this claim is a statement on the 911 audio recording by [REDACTED] that she “tried calling from the home phone but he disconnected it.” Both [REDACTED] and the Respondent claimed in their

² [REDACTED] initially testified that she only learned that the Respondent had the guns in this location; however, she acknowledged that she had previously made a statement to Mohin and Wilhelmy that the Respondent “usually keeps them on top of the counter, in the kitchen, above the cabinet.” (T 57 – 59).

testimony at this trial the phone was out of service well before the argument. As noted previously this Court does not accept the trial testimony of [REDACTED] or the Respondent, but nonetheless there is nothing on the audio recording or anywhere else in the record to indicate how [REDACTED] knew the Respondent disconnected the telephone.

There are other possible reasons the phone did not work. For instance, there might have been a malfunction unrelated to the Respondent, or [REDACTED] in her highly emotional state, did something to cause the phone not to work. Moreover, it would have made no sense for the Respondent to interfere with [REDACTED] use of the house phone as he certainly was aware that she had a cell phone, (apparently the children had cell phones as well).

The Department has provided no telephone or other records to demonstrate that the house phone was operable prior to the incident in question. Consequently there is no evidence to support [REDACTED] claim on the 911 call that he disconnected the telephone and that he did so to prevent her from calling 911. The Respondent is found Not Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined, see *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

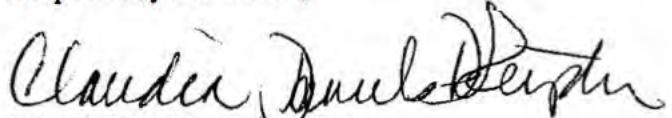
The Respondent was appointed to the Department on January 9, 1986. Information from his personnel folder that was considered in making this penalty recommended is contained in the attached confidential memorandum.

The Respondent has been found Guilty of two Specifications. While both of these

charges are troublesome it should be noted that the first Specification involves verbal conduct only.

Considering all of the relevant factors, the appropriate penalty in this case is the loss of 30 vacation days.

Respectfully submitted,



Claudia Daniels-DePeyster

Assistant Deputy Commissioner – Trials

APPROVED



JUN 21 2010

RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

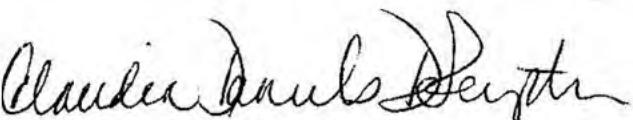
From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE JEFFREY MCAVOY
TAX REGISTRY NO. 909823
DISCIPLINARY CASE NO. 85410/09

In 2007, the Respondent received an overall rating of 5.0 "Extremely Competent" on his annual performance evaluation. He was rated 4.5 "Extremely Competent/Highly Competent" in 2008 and 4.0 "Highly Competent" in 2009. He was been awarded two medals for Excellent Police Duty and one medal for Meritorious Police Duty.

The Respondent, who was a member of the Transit Police Department, became a member of this Department with the 1995 merger. [REDACTED]

[REDACTED] Since the merger, he has been the subject of two prior disciplinary adjudications. In 2000, he forfeited 15 suspension days after being found guilty at trial of using excessive force. In 2006, he was found not guilty of assaulting his girlfriend. Based on his overall record, the Respondent was placed on Level-II Discipline Monitoring in June 2009.

For your consideration.


Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials